83-175

No. —

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CATHOLIC HOME BUREAU,

Petitioner,

-against-

ANNA DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE QUESTIONS PRESENTED

(1) WHETHER THE DOCTRINE OF THE LAW OF THE CASE WAS PROPERLY INVOKED BY THE CIRCUIT COURT IN REVERSING THE DISTRICT COURT'S JUDGMENT FOR PETITIONER NOT WITHSTANDING THE VERDICT IN VIEW OF THE HOLDINGS OF YOUNGBERG v ROMEO and PARRATT v TAYLOR?

(2) WHETHER THE TRIAL JUDGE WAS CORRECT IN CONCLUDING THAT THE TOTALITY EVIDENCE SO OVERWHELMINGLY FAVORED PETITIONER THAT NO REASONABLE AND FAIR MINDED JURY COULD FIND PETITIONER DELIBERATELY INDIFFERENT TO RESPONDENT'S WELL-BEING?

The parties to the proceeding are: plaintiff-respondent, ANNA FARIA"DOE" and the defendant-petitioner, CATHOLIC HOME BUREAU FOR DEPENDENT CHILDREN. Plaintiff's other claims have either been settled or dismissed. No other parties to this proceeding are involved.

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OPINION BELOW

The opinion of the Circuit Court of Appealswhich reversed the judgment of the District Court and reinstated the jury verdict for respondent is as yet not officially reported having been decided on June 2, 1983. The opinion is set forth in the appendix hereto.

JURISDICTION

The Court of Appeals for the Second Circuit reversed and reinstated judgment for respondent on June 2,1983. This Petition is timely filed within sixty (60) days of the date of the Court of Appeals reversal. Jurisdiction is invoked pursuant to 28 U.S.C.§1257.

STATUTES INVOLVED

U.S. CONSTITUTION, 14th AMENDMENT
42 U.S.C. §1983

STATEMENT OF THE CASE

Respondent commenced this civil rights action against Petitioner, The Catholic Home Bureau for Dependent Children, seeking money damages for the deprivation of her constitutional right to be free from harm while she lived in one of petitioner's foster homes. Respondent lived from 1965 to August 1977 in the foster home of Mr. & Mrs. Frank Senerchia. The foster father, a former New York City policeman lived in a residential community on Staten Island with his wife and four natural children.

Respondent commenced this lawsuit in 1979 alleging that from 1971 to 1977 the foster father regularly abused and mistreated her. Respondent contends that the petitioner failed to adequately investigate and discover the foster father's violent propensities and

to insure respondent's freedom from harm (Complaint par.45).

All was well in the foster home until 1971 when the abuse began. Respondent never complained to anyone of any mistreatment or even of dissatisfaction with the foster home before August 1977 at which time she was immediately removed. Moreover, respondent not only told petitioner of her fervent wish to be adopted she even admitted to all agency professionals that she had been sexually active with peers at her public school. Thus, not only was petitioner misinformed it was intentionally mislead by respondent.

At the first trial on May 27,1980 the District Court (Pollack,J.) on a reserved decision granted petitioner's motion to dismiss but permitted the case to go to the jury noting:

"The evidence was in-

> adequate as a matter of law of a constitution violation. This Court is not in the business of administering state created duties or obligations. This case falls hopelessly short of constituting deliberate indifference to the supervision, living conditions, welfare, treatment, or conduct of the foster parents."
>
> * * * *
>
> In this Court's view, no reasonable person could find, in the light of the evidence adduced at trial, that a federal case under the Civil Rights Act was made out against The Catholic Home Bureau. Any verdict for the plaintiff could be reached only through passion or prejudice and would have to be set aside as unreasonable."
> (A- 75)

The jury verdict for petitioner was subsequently set aside on appeal and the case remanded for a new trial because of erroneous jury instructions. DOE v N.Y.C. DEPT. OF SOC. SERVICES, 649 F.2d 134 (2nd Cir.1981)(hereinafter "DOE I").

The Court found error in the jury

instruction holding that the jury should have been instructed

> "as to the occasionally subtle yet pivotal distinction between ordinary negligence and grossly negligent or reckless conduct informing them that only the latter types of behavior could support Plaintiff's claims."
> Doe I at 144

* * * * *

> "Defendants maybe held liable under §1983 if they, or in the case of an agency, its top supervisory personnel, exhibited deliberate indifference to a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution."
> Doe I at 145

After the jury found for respondent at the second trial and assessed damages at $225,000.00 dollars, the District Court (Brieant,J.) entered judgment in favor of petitioner notwithstanding the verdict.

> "The Court finds and concludes that considering these facts particularly and all the other facts established by the totality of the evidence at trial viewed in the light most favorable to the plaintiff, and reslolving all issues of credibility in her favor the evidence could not possibly support a verdict in favor of the plaintiff on liability as a federal civil rights action within the rubic of the Court of Appeals opinion in this very case."
>
> (Emphasis added)
> (A- 62)

On the second appeal (hereinafter "DOE II") the Circuit Court reversed and reinstated the jury verdict upon the grounds that there was no basis for the District Court to enter a judgment notwithstanding the jury verdict and that it was the law of the case that a jury question existed.

POINT ONE

THIS CASE PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE.

This case presents legal issues of far reaching effect on foster care. Here, as in Romeo v Youngberg, 102 S.Ct. 2452 (1982) the Court is called to review a vexing sociological problem. In New York alone there are some 50,000 children in foster care living in a variety of settings ranging from institutions to foster homes. [1] New York has recognized that foster home care is the best available alternative to a natural home where the natural parents cannot or will not provide the "positive nurturing family relationship" and "normal family life in a permanent home". N.Y. Soc. Serv. Law §384-b (1) (b),1(a) (i).

1. See note 13, Smith v. Offer, 431 U.S.816 (1978)

The holding of the Circuit Court refused to extend to the judgment of social work professionals the same presumption of validity that mental health care professionals are entitled to. Romeo at 2462. It has thus relegated social worker professionals and foster care to a position of secondary importance to institutional mental health care.

It also represents a situation where the Circuit Court has ignored the express holdings of Parratt v Taylor, 451 U.S. 527 (1981) and Youngberg v Romeo, U.S. 102 S.Ct. 2452 (1982). In so doing, the Circuit Court has notwithstanding this Court's repeated admonitions against creating constitutional torts, done exactly that. One obvious result of this holding will, of course, be increased federal litigation. Under the Second Circuit's holding, the federal courts will become repositories

for most, if not all, personal injury claims occuring to those foster care children.

More important is the deleterious effect of the Second Circuit's holding on foster care agencies to place the children in institutional setting where the judgments of their professionals will be entitled to presumptive validity. Thus, the Second Circuit's holding may well signal a return to the foster care of a half century ago of orphanages since the exposure and risk of a federal lawsuit is increased if foster home care is chosen. Such a set back in child welfare cannot be permitted to stand. Nor can child welfare tolerate the loss of social workers and other foster care professionals who will eschew a career in foster care for the greater safety of hospital social work or institutional

work.

There is no rational basis to accord the judgment of a psychologist in a mental institution presumptive validity and deny that presumption of validity to his judgement concerning the treatment of a child in foster home care. Yet, this is precisely the result of the Circuit holding. Clearly, Romeo requires that the judgment of the foster care professionals be entitled the same presumption of validity as mental health care professionals.

This Court should intervene at this point to vitiate the fear and confusion which will certainly result from the holding of the Circuit Court. Accordingly, and because this case involves issues of great public importance and pernicious implications to the foster care programs, not only of New York but for other states as well, the

Court should grant review of this case.

POINT TWO

THE CIRCUIT COURT REVERSAL OF JUDGMENT FOR PETITIONER NOTWITHSTANDING THE VERDICT WAS A CLEARLY ERRONEOUS APPLICATION OF THE DOCTRINE OF THE LAW OF THE CASE.

Contrary to the holding of the Circuit Court, the doctrine of the law of the case was never intended as a rigid rule. It is only addressed to the Court's good sense. Warton v Hirsch,348 F.2d 906 (2nd Cir.1965). It does not preclude second review if substantial justice warrants it. Lehrman v Gulf Oil Corp.,500 F.2d 659 (5th Cir.1974). And, where as here there is new authority which alters the applicable standards, or the evidence at the second trial is substantially different, or the earlier decision is clearly erroneous and works a manifest injustice, then it is clearly erroneous to invoke the doctrine of the law of the case. Melong v Micronesian

Claims Com.,643 F. 2d 10 (D.C.Cir.1980). Yet, despite the presence of all of the above, the Circuit Court mistakenly imposed the doctrine. In so doing they resurrected what amounts to dicta inDOE I and once again emasculated the findings of the trial judge "whose vantage point is superior." Tackett v Kidder, 616 F.2d 1050 (8th Cir. 1980).

> "Granted, a judgment n.o.v. at times seem harsh, however, we agree with the trial judge whose presence at the trial afforded him a much better vantage point from which to evaluate the evidence not from a transcript alone, but from seeing and observing the witnesses themselves." [2]
> Tackett at 1053

We do not disagree with the prescribed test to determine if judgment n. o.v. is proper. However, the Circuit Court may not as it has done here over-

2. See also, Neely v Martin K. Eby Const.Co,386 U.S.317 (1967); Cone v W. Va. Pulp & Paper Co.,330 U.S. 212 (1947).

look uncontroverted evidence unfavorable to the non-movant. N.A.B.C.v G.M.C.,572 F.2d 953, 956 (2nd Cir.1978). Likewise, the inferences drawn must be within the range of reasonable probability and not at war with undisputed facts (Read v Ulmer, 308 F.2d 915 (2nd Cir. 1962).

YOUNGBERG v ROMEO and PARRATT v TAYLOR CHANGED THE APPLICABLE LEGAL STANDARDS.

In DOE I the Circuit Court critically faulted the trial judge's (Pollack,J.) jury instruction for failure to explain the mental state of "deliberate indifference" which it held was necessary for a finding of petitioner's liability. DOE I at 141. Quite obviously, the Circuit Court was endeavoring to extend Estelle v Gamble, 429 U.S. 97 (1976), an 8th Amendment case involving a warden's supervision of a penal institution, to the 14th Amend-

ment and the non-penal circumstances of foster care. Romeo clearly destroys both the Circuit Court's reliance on Estelle in DOE I and the basis for its reversal of the jury verdict for petitioner in DOE 1.

In DOE II the Circuit Court erroneously adhered to its earlier reasoning in defiance of both the specific holding and the basic reasoning of Youngberg v Romeo, 102 S.Ct. 2452 (1982). Contrary to the Circuit Court in DOE II, Romeo dramatically negates its holdings in DOE I in several important respects. First, in Romeo this Court squarely rejected extending the "deliberate indifference" standard of Estelle and the 8th Amendment to non-penal settings. Romeo at 63. Second, Romeo mandates that the judgments of petitioner's professionals(Drs. Lewis, Piana, social workers, Crowe, Collechia, Dellaverson,Gambino,etc.)

be accorded presumptive validity, a point clearly missed by the Circuit Court in DOE II.

> "For these reasons, the decision if made by a professional, is presumptively valid, liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible acutally did not base the decision on such a judgment." Romeo at 62

If the judgment of a professional at a mental institution is entitled to presumptive validity then surely the judgment of the foster care professionals (i.e. agency psychologists, psychiatrists and social workers whose responsibilities are certainly no less burdensome than those institutional compatriots and whose direct control is, of necessity, much less) is no less deserving of presumptive validity imposed by Romeo. Third, the Circuit Court

theory that the standard in DOE I was higher than the standard in Romeo simply misses the point. The standard it insisted be applied (i.e."deliberate indifference"to a non-penal, non-8th Amendment case) in DOE I was held to be clearly erroneous in Romeo outside the penal setting. Thus, not only was it clearly erroneous to apply the doctrine of the law of the case,petitioner was entitled on the second trial to a jury charge that the decisions of its professionals are presumptively valid.

Of equal, if not greater, significance was this Court's holding in Parratt v Taylor, 451 U.S. 527 (1981), which the Circuit Court relegated to a footnote. DOE II at Slip op 29. Parratt in and of itself defeats invocation of the doctrine of the law of the case. The Circuit Court's failure to discern the import of Parratt to civil rights actions such as

this was clearly erroneous. The Circuit Court's circumvention of Parratt on the ground that it concerned a 14th Amendment property right as opposed to Respondent's 14th Amendment liberty right is a distinction without a difference.

In Parratt, this Court held that the 14th Amendment is not a font of tort law to be superimposed upon whatever systems may already be administred by the States. To circumvent Parratt because it factually concerned a deprivation of property is to miss the clear holding of the Court. Parratt has a much broader significance and particular application to this case.

> "Although he has been deprived of property under color of state law, the deprivation occured as a result of the authorized failure of agents of the state procedure.....The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of

the State." Parratt at 1717

The direct application of Parratt to the constitutional right at issue in DOE is made clear beyond peradventure by reliance in Parratt on Ingraham v Wright, 430 U.S. 651 (1977), and Paul v Davis , 424 U.S.693 (1976). Both cases involved 14th Amendment liberty rights. Thus, when this Court remarked that:

> "Application of the principles recited above to this case leads me to conclude the respondent had not alleged a violation of Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property the deprivation did not occur as a result of some established state procedure. Indeed the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure...
> (emphasis added)

it might well have been addressing the deprivation alleged herein (i.e. petitioner's failure to comply with state reporting requirements regarding suspected abuse and supervisory require-

ments).

In Parratt, there was no claim of an intentional deprivation of the constitutionally guaranteed 14th Amendment right or that the state remedy was inadequate or unavailing. Likewise, here respondent does not charge an intentional deprivation but rather petitioner's failure to prevent the injury as a result of alleged deliberate indifference to respondent's well-being. It is revealing to note that respondent does not contend that the state's rules, regulations and laws are inadequate, only that the petitioner neglected to comply with those requirements. And, finally, respondent does not complain of any inadequacy of the state remedies available to her (and which she is simultaneously pursuing) for her injuries. In short, respondent seeks to create a constitutional tort.

Unfortunately, the Circuit Court's holding embracing as it does respondent's illogic would make every wrong committed by a foster care employee congnizable under §1983. A result that Parratt eschewed.

> "To accept respondent's argument .....would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the 14th Amendment cognizable under §1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official [or foster parent] could allege a constitutional violation under §1983....We do not think that the drafters of the 14th Amendment intended the Amendment to play such a role in our society."
> Parratt at 538

Thus, it was clearly erroneous for the Circuit Court to reverse the judgment for petitioner notwithstanding the verdict by holding that Romeo and Parratt

did not alter the earlier legal standard of DOE I.

POINT THREE

THE CIRCUIT COURT'S REVERSAL WAS CLEARLY ERRONEOUS SINCE THE EVIDENCE WAS OVERWHELMING THAT PETITIONER WAS NOT DELIBERATELY INDIFFERENT TO THE WELL-BEING OF THE RESPONDENT

No fair minded and reasonable person could conclude on the evidence presented that the petitioner displayed a mental state of deliberate indifference to respondent's welfare. Concededly, petitioner did not discover the alleged abuse. It would never have been discovered but for Mrs. Senerchia finding respondent and Mr. Senerchia in a "comprising" position. If the foster mother who was present in the home twenty-four hours a day seven days a week was unware of the abuse it certainly cannot be realistically expected that petitioner, whose workers visits are announced in advance, would discover such abuse by reason of more frequent home visits.

In fact, the home visits by Ms. Dellaverson every three weeks from June 1975 to May 1977 established just the contrary. She concluded "no evidence of sexual involvement."

Of course, the evidence unequivocally demonstrated not indifference to respondent's welfare but intense concern and interest. To permit the Circuit Court holding, that the extraordinary interest demonstrated by petitioner during time in issue is insufficient to defeat a charge of deliberate indifference, to stand would work a manifest injustice.

By way of example, we cite the actions of petitioner during the critical year 1975 to show the interest in respondent's well-being that petitioner manifested and which is uncontradicted:

"-CHB's social worker inter-

viewed plaintiff at foster home (3/19, 5/12, 6/12, 7/21, 8/11, 8/27, 9/15, 10/22, 11/19, 12/10);

-CHB social worker in telephone contact with foster parents (1/17, 1/10, 2/4. 2/10, 2/14, 2/25, 2/28 (2x), 3/3, 3/7, 3/11, 3/19, 3/20 (2x) 4/9, 4/11, 4/16, 4/17, 5/7, 5/9, 5/14, 6/5);

-plaintiff interviewed and examined by Dr. Lewis (1/9, 1/24,); by Dr. de Alvarado (3/19);

-plaintiff psychiatrically examined by BCG psychiatrist, Dr. John Davis, M.D. (5/17);

-foster father seen by Dr. Lewis (1/9);

-foster parents both seen by Dr. John Davis, (5/17);

-plaintiff hearing tested at St. Vincent's as per CHB arrangements (3/12, 3/24); her speech evaluated (4/3 [Ex. j & K];

-CHB social worker in telephone or person contact with New York City Board of Educations's Bureau of Child Guidance regarding school placement (1/10, 2/18, 2/21, 4/23, 4/24, 5/14, 5/15, 5/21, 6/3);

-CHB case conference regarding

plaintiff were held (1/9, 2/27, 3/19, 4/10);

-plaintiff was the subject of many memorandums (2/17, 2/20, 3/13. 3/21, 3/24, 4/10, 4/11, 4/17, 4/25, 4/28, 5/12, 6/16);

-CHB social worker in contact with St. Vincent's regarding plaintiff (2/24-letter, 2/25-telephone, 3/3 , 4/23, 4/30 telephone);

-plaintiff physically examined by Dr. Salome (9/23,); her eyes tested (6/21);

-CHB social worker in contact with plaintiff's school (2/19, 4/15, 4/16); with truant officer (4/14);

-CHB social worker arranged for summer school at Staten Island Academy. A- 110

No reasonable and fairminded person could conclude in view of the foregoing that petitioner was concerned about respondent's hearing but cared not at all about whether she was being mistreated. Or, put another way no reasonable person could conclude that you can be concerned about a foster

child's eye glass prescription and at the same time be indifferent to whether the foster father is poking her in the eyes. Quite obviously the Circuit Court faulted the petitioner for failing to fulfill all of its duties. But in no way can such failure be characterized as the result of deliberate indifference to respondent's well-being. To do as the Circuit Court did is to twist the facts to conform to its erroneous theory of the case.

We believe that the only proper fair and reasonable conclusion that could be drawn from the evidence was that of the District Court trial judge.

> "The Court finds and concludes that considering these facts particularly and all the other facts established by the totality of the evidence at trial, viewed in the light most favorable to the plaintiff, and resolving all issues of credibility in her favor the evidence could not possibly support a verdict in favor of

> the plaintiff on liability as a federal civil rights action within the rubic of the Court of Appeals opinion in this very case."
>
> (Emphasis added)

The District Court found "beyond doubt" that the evidence was not sufficient to support a finding that Catholic Home Bureau was deliberately indifferent and that there was no basis upon which a finding of deliberate indifference could be found by jurors acting reasonably. (A-66)

Judge Brieant adhered to his determination on re-argument and noted:

> "It's [i.e. the Court's] ruling is based on what it heard and saw and its own findings and conclusions. These are believed to be just and correct following re-argument."
>
> (Emphasis added)

We believe that the decision of the trial judge was perfectly correct. The evidence was overwhelming that petitioner was always concerned for respondent's

well being and never deliberately indifferent to her constitutional right to be free from harm. Accordingly, it was clearly erroneous for the Circuit Court to reserve the trial court's judgment for petitioner notwithstanding the verdict.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted, this 31st day of July, 1983:

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APPENDIX

Before:

Oakes, Kearse, and Sloviter,*

Circuit Judges.

Appellant seeks reversal of judgment notwithstanding the verdict of the United States District Court for the Southern District of New York, Charles L. Brieant, Judge, in favor of defendant Catholic Home Bureau on a claim under 42 U.S.C. § 1983 (Supp. IV 1980) and reinstatement of the jury verduct for appellant awarding $225,000 damages. Appellant claims she was entitled to jury's verdict because the previous appellate decision in this case, Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), is the law of the case that a jury

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*Of the United States Court of Appeals for the Third Circuit, sitting by designation.

question existed and because there was no basis for entering a judgment notwithstanding the verdict. Judgment is reversed on both grounds.

*

CAROLYN KUBITSCHEK, Edward N. Simon, New York, NY, David J. Lansner, Lansner & Wendt, New York, NY, Louise Gruner Gans, New York, NY for Appellant.

FREDERICK J. MAGOVERN, New York, NY for Appellee.

*

Sloviter, Circuit Judge:

Appellant Anna Doe's claim under 42 U.S.C. § 1983 (Supp. IV 1980) against the Catholic Home Bureau ("the Bureau") comes before this court for the second time. On the first appeal, we reversed the judgment entered on the jury verdict for the defendant Bureau and remanded the case for a new trial because the jury instructions were

misleading and because certain evidentiary rulings were erroneous. Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) (Doe I). After the jury found for plaintiff at the new trial and assessed damages at $225,000, Judge Brieant, the trial judge, United States District Court for the Southern District of New York, entered judgment notwithstanding the verdict in favor of the defendant Bureau. The judge rejected plaintiff's argument that she was entitled to the jury verdict under this court's earlier decision. Instead, the trial court held the evidence was so overwhelming that no reasonable jury could find the Bureau acted with deliberate indifference, the standard used to establish liability under the section 1983 claim at issue. Plaintiff appeals the entry of judgment in favor of the Bureau; we reverse and

remand for reinstatement of the jury verdict.

I.

BACKGROUND

A.

Facts

Because this case reaches us on appeal from a judgment notwithstanding the jury's verdict for the plaintiff, we must view the evidence in the light most favorable to the plaintiff who "must be given the benefit of all reasonable inferences which may be drawn in [her] favor from [the] evidence." Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970).

Anna Doe, born in 1961, was two years old when she was placed in foster care along with her sister. The New York City Commissioner of Welfare, their legal custodian, arranged for defendant Catholic Home Bureau to

supervise their care beginning January 5, 1964. The Bureau placed the girls with Mr. and Mrs. Senerchia, having previously investigated and certified them as suitable for foster placements. The Bureau placed two additional foster children with them in 1965.

The record contains evidence that Anna was regularly and frequently physically and sexually abused by Mr. Senerchia, her foster father, starting in 1971 when she was about ten or eleven years old. The physical abuse consisted, inter alia, of beating her over her entire body with his hands and with a belt, throwing her down the stairs and even once cutting her with a hunting knife. Beginning at the same time when Anna was ten or eleven, and continuing for more than six years, Mr. Senerchia forced Anna to have intercourse and oral sexual relations with him. He had

threatened Anna she would be institutionalized if she told anyone of his actions.

The Bureau took decisive action only after Mrs. Senerchia reported to the Bureau in August 1977 that she had recently discovered Mr. Senerchia and Anna in bed together. On receipt of this information, the Bureau barred Mr. Senerchia from returning home and the Bureau reported the abuse to the appropriate city authority, the Confidential Investigation Unit. Shortly thereafter, one of Anna's foster sisters reported that she had also been physically and sexually abused by Mr. Senerchia. The Confidential Investigation Unit corroborated the occurrence of abuse of Anna. It is undisputed that prior to August 1977, the Bureau did not report any suspected abuse either to the New York City Department of Social Services or to the Confidential Unit.

In this law suit, filed in April 1979, Anna claims that the Catholic Home Bureau violated her constitutional right to be kept free from harm. She alleges that the Bureau's failure to supervise her placement adequately and to report her situation to the New York City Department of Social Services as a case of suspected child abuse led to continuation of her mistreatment. Plaintiff contends that the Bureau had violated specific duties imposed by New York law; that it had enough information beginning at least in early 1975 to give it actual or constructive notice of the abuse to which Anna was being subjected; and that the Bureau was grossly negligent and deliberately indifferent to Anna's physical well-being in failing to act, resulting in Anna's continued abuse.

To support the jury's verdict, which depended on a finding of deliberate

indifference to plaintiff's needs, plaintiff relies primarily on events beginning in early 1975. The case records evince some earlier concerns. There are notations about Mr. Senerchia's unusual dominance within the family, the difficulty of dealing with him, the suspicion that Mr. Senerchia had severe emotional problems, the difficulties which Mr. and Mrs. Senerchia placed in the path of workers seeking to see Anna alone, and the Senerchias' practice of often answering questions directed to Anna. Nonetheless the early case records were generally positive about the family environment.

However, in January 1975, when Anna was in the eighth grade, specific information of a problem was communicated to Sister Una McCormack, the Bureau's executive head. A priest told her that Mr. Senerchia had taken Anna out of her

school allegedly because "Anna was sexually acting out in school" with other children, and was attempting to get her into parochial school. Sister Una directed that Anna be seen by Dr. Lewis, a Bureau psychologist. Ms. Crowe, the supervisor of the Staten Island office which was handling Anna's case, contacted Mr. Senerchia regarding this appointment. Mr. Senerchia repeated the allegation of frequent sexual activity to Ms. Crowe, and stated that Anna, upon his prodding, had confessed to sexual involvement with other school children including actual intercourse occurring since the first grade. These activities allegedly occurred during school hours in empty classrooms, hallways, the gym and the cafeteria. The case records of conversations of Bureau personnel with Mr. Senerchia note that he seemed eager to give details of

this sexual activity and that he seemed to derive some satisfaction from recounting the matter. Mr. Senerchia insisted that his wife not be told and that the Bureau not approach the school.

Ms. Moroney, Ms. Crowe's supervisor, visited the Bureau's branch office, read the case record and discussed the situation. Ms. Moroney took the case record containing background information on the Senerchia family to Dr. Lewis. Dr. Lewis was informed that Anna had been "engaging in sexual activity with classmates." Dr. Lewis, however, did not read the case record before interviewing Anna and Mr. Senerchia. During this interview on January 9, 1975, Anna admitted to "sexual play" with other children and evinced anxiety about the repercussions the episode might have on the possibility of her adoption by the Senerchias.

Dr. Lewis' impression was that Anna had probably been engaging in some "sex play" and concluded, after spending 15 minutes with Mr. Senerchia, that he seemed to be a concerned and warm parent. She recommended that Anna be transferred to a more appropriate educational setting, but that the foster home placement be maintained. Dr. Lewis and the Bureau's personnel agreed, after conferring, that Anna should not return to the school she had been attending. Significantly, on learning of Mr. Senerchia's allegation, no one from the Bureau contacted the school where Anna had allegedly engaged in these active and frequent sexual activities either to corroborate Mr. Senerchia's story or to see what light the school authorities could shed.

Shortly thereafter, Dr. Lewis made an up-to-date psychological evaluation of Anna to measure her intelligence for purposes of educational placement, since the Bureau was seeking to have Anna placed in a special class for the mentally handicapped. A representative of the City's Bureau of Child Guidance told Anna's caseworker that Anna's test results were above the ceiling for placement in a mentally handicapped class. The caseworker informed that representative at the City's Bureau that Anna's foster father had removed her from school, but did not give the reason. The Catholic Bureau then considered trying to place Anna in a special class for the emotionally handicapped. Since such a placement required a psychiatric evaluation in addition to the psychological evaluation performed by Dr. Lewis, Anna was

scheduled to see Dr. de Alvarado, an agency psychiatrist, on March 5, 1975, and Mr. and Mrs. Senerchia were requested to attend. A staff conference on Anna's case was held in late February at Dr. de Alvarado's request. The March 5, 1975 appointment was cancelled because Mr. Senerchia had been hospitalized, but Dr. de Alvarado saw Anna alone on March 19th.

Dr. de Alvarado testified that she had carefully read the case history and felt something did not add up. Upon questioning Anna, she did not believe the details of Anna's sexual involvement with other school children. She asked Anna directly if she was sexually involved with Mr. Senerchia. Although Anna did not answer, Dr. de Alvarado knew that a great majority of abused children deny occurrence of such abuse. Dr. de Alvarado reached the

judgment that sexual abuse was occurring, which she based upon her reading of the case history and her observation of Anna during the interview, including Anna's tearful reaction to the question about sexual involvement with her foster father. After the interview, the psychiatrist called a conference that same day with Ms. Crowe and others and, as Dr. de Alvarado testified, "very explicitly said to them that I thought there was sexual abuse in that home and that she [Anna] should be removed so that they could explore" the situation. Dr. de Alvarado testified that she "thought it was a crisis situation." Her report recommended removal from the foster home and placement in a residential structured situation.

Although Dr. de Alvarado had alerted the Bureau personnel to her views on March 19, 1975, no immediate

action was taken by them. Dr. de Alvarado was requested by the Bureau to delete references to any suspected sexual relationship from her written report, apparently so that the report could be used by those outside the Bureau for school placement purposes, and she did so. An administrative review in the Bureau was not held until April 10, 1975, when Ms. Maroney, Mr. Galano, Special Services Coordinator, Ms. Crowe, and Ms. Klages, Anna's caseworker, met and agreed, as set forth in the case records, that "a continuing effort should be made to get Anna into a school" and that "Mr. Senerchia's involvement with Anna should be further investigated." Nonetheless, the Bureau undertook no such investigation on its own, nor did it request an investigation by others. No one from the Bureau reported suspected abuse to the

Confidential Investigation Unit, although only the month before there had been a memorandum to child care agencies from the City emphasizing that "[i]t is imperative that diligent reporting" of abuse be made. Doe I, 649 F.2d at 148 n.13. Furthermore, no home visits were made between November 12, 1974 and May 12, 1975, and Anna, who had previously been classified as having borderline intelligence, remained out of school for the semester.

The truant office from Anna's school became concerned about Anna's absence. After learning Mr. Senerchia's asserted reason for removing Anna from school, the truant officer telephoned the Bureau in April 1975 and told the caseworker that "this [Mr. Senerchia's allegations] could not be occurring" because the school "is not . . . haphazardly run," Anna could not have been

cutting classes, and there were no empty storerooms or classrooms where the alleged activity could have taken place. The school's principal called the Bureau shortly thereafter to report he had investigated and confirmed that Anna had not been cutting class. When the caseworker finally saw Mr. Senerchia on May 12, 1975 and questioned him about his allegations, Mr. Senerchia gave a version which the caseworker noted "differ[ed] greatly from the version Mr. S. originally gave."

In May 1975, Anna was examined concerning her school placement by Dr. Davis, a consultant psychiatrist for the City's Board of Child Guidance. The Bureau did not inform Dr. Davis of Dr. de Alvarado's assessment of Mr. Senerchia's involvement with Anna. Dr. Davis advised against a residential placement but felt Anna needed a special

slow class. When Anna finally resumed school in the fall, she attended a parochial school rather than the special classes for which the Bureau had been waiting the prior semester.

On June 6, 1975, the Bureau submitted its annual report to the City. It did not mention Mr. Senerchia's withdrawal of Anna from school, Dr. de Alvarado's suspicions and recommendation, or the allegations of Anna's sexual activity in school, although these events had occurred in the year covered by the report. Nor did the Bureau probe further based on the information at hand. Instead, the Bureau transferred the case to a different office supervisor (Ms. Gambino) and caseworker (Ms. Dellaverson) in the summer of 1975 because of "the complications surrounding [the] case" and "in an effort to move away from the historical relationship

(or lack of) that exists between [the Senerchia family] and unit staff." Ms. Dellaverson was never instructed to investigate the possible sexual involvement of Anna with her foster father. She testified that she visited the Senerchia home every three weeks or so. The case records do not reflect any visitations between September 14, 1976 and April 1, 1977, another critical period.

In September 1976, Mr. Senerchia informed the Bureau that Anna's foster sister had been "sexually acting out" in a fashion similar to his reports about Anna. He removed the foster sister from school. Ms. Dellaverson told her supervisor, Ms. Gambino, that she felt this was a "repetition syndrome" and Ms. Gambino "felt there was something abnormal here." Nonetheless, this new and

troubling development did not evoke any suspected child abuse report by the Bureau.

Because the Senerchias were planning to adopt Anna and her sister, Ms. Dellaverson and Ms. Gambino decided that a psychiatrist should interview the Senerchias, Anna, and her sister before proceeding with the adoption. The Senerchias initially resisted a psychiatric visit, but were finally seen in March 1977 by a Catholic Bureau psychiatrist, Dr. Piana. Ms. Dellaverson testified that she did not think she told Dr. Piana about Dr. de Alvarado's suspicions or that the children had been taken out of school. Although Dr. Piana testified at the trial that he had reviewed the highlights of the case record, this recollection was in conflict with his previous deposition testimony that he had read only a two page case

summary before his interview rather than the entire case record. This summary mentioned that Anna and her foster sister had been involved in "sexual acting out" at school, but did not state that Anna had been removed from school and did not refer to Dr. de Alvarado's suspicions. Dr. Piana found no psychiatric contra-indications to the Senerchias adopting Anna and her sister. There was no testimony that he had asked the girls about sexual abuse at home, even though he was aware of the reports of Anna's sexual acting out in school. His testimony indicated a disinclination to questioning abouat sexual involvement at home. It is not clear from the record whether the Bureau provided Dr. Piana with a copy of Dr. de Alvarado's earlier report.

In the summer of 1977, Mr. Senerchia informed the Bureau he was

going to divorce Mrs. Senerchia and planned to marry a young woman whose child he had fathered. After Mrs. Senerchia learned of her husband's plan to divorce her, she went to the Bureau in August 1977 with Anna and reported she had found Anna and Mr. Senerchia in bed together. The record indicates that the Bureau then acted promptly in reporting the abuse to authorities and in moving to protect the girls.

B.

Liability

The Bureau does not contest that 42 U.S.C. § 1983 applies to it. As a placement agency, it had various statutory and contractual obligations. It was charged by state law with the task of annually recertifying the Senerchia home. See Doe I, 649 F.2d at

137. The Bureau also had a contractual agreement with the Department of Social Services of the City of New York by which it undertook, inter alia, to supervise the foster home, to provide appropriate comprehensive services, and to submit periodic reports concerning the placement so that the City could monitor the situation. Plaintiff's evidence showed, however, that there were some lengthy periods when no Bureau personnel visited the Senerchia home, and that these gaps came at critical times under the events of this case. Furthermore, the Bureau failed to submit comprehensive and timely reports. Finally, and most importantly, as noted in Doe I, N.Y. Soc. Serv. Law § 413 (McKinney Supp. 1982) "imposed a strict duty on the agency to report all suspected cases of child abuse to the Department of Social Services." 649 F.2d

at 145 & n.8 (emphasis added). The duty of agencies supervising a foster home to report suspected child abuse was reiterated on March 5, 1975 in a memorandum by Assistant Commissioner Parry which emphasized that "[i]t is better, by far, in the best interests of the children we are mandated to protect, to err on the side of reporting cases which may be unfounded, than not to report and thereby endanger our children." Doe I, 649 F.2d at 148 n.13. Although the Bureau's staf psychiatrist, Dr. de Alvarado, explicitly stated she suspected sexual activity between Anna and her foster father, the Bureau transmitted no report of suspected abuse.

In Doe I, we reversed the trial court's entry of judgment for the defendant. We held that the jury had not been properly instructed with regard to the meaning of "deliberate

indifference," the standard of liability. The trial court had erroneously conveyed "an impression of deliberate indifference requiring a higher degree of knowledge, ill-will and culpability than is actually the case." 649 F.2d at 142. Moreover, "[i]t failed to explain to the jury that repeated acts of negligence could be evidence of indifference." Id. We furthermore noted that gross negligence and deliberate indifference are "closely associated" and that the former "creates a strong presumption" of the latter. Id. at 143 (footnote omitted). We found that the trial court erred by instructing the jury that plaintiff had to show that the Bureau had actual and specific knowledge of Anna's mistreatment. Id. at 144-45. We stated liability under section 1983 could be established if supervisory personnel "exhibited deliberate indifference to a known injury, a

known risk, or a specific duty." Id. at 145. We also held that the trial court erroneously excluded certain evidence, such as parts of the Parry memorandum and evidence of abuse of Anna's foster sister, and that the trial court erred in admitting certain other evidence of dubious relevance without cautionary instruction.

After the second trial, the jury returned a verdict for the plaintiff and assessed damages at $225,000. The trial court set aside the verdict and rejected plaintiff's argument that the holding in our prior opinion negated its power to rule on a motion for judgment notwithstanding the verdict. The trial judge also held that the evidence was so overwhelming that no reasonable jury could have concluded the Bureau acted with deliberate indifference, although he believed there was evidence of

negligence. He stated, however, that if his determination was reversed on appeal, the damage award was proper. No cross-appeal was taken from this latter determination. Plaintiff appeals the grant of defendant's motion for judgment notwithstanding the verdict.

II.

DISCUSSION

There are two primary issues on appeal:[1] (1) the application of the law of the case doctrine and (2) whether the evidence was so overwhelming that no

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[1]We reject the Bureau's additional contention that this court lacks jurisdiction under Fed. R. App. P. 4(a). The district court entered judgment, n.o.v. for the Bureau on June 4, 1982 and subsequently granted plaintiff's motion for reargument but adhered to its original decision on June 24, 1982. The notice of appeal, filed June 30, 1982, was timely, and it was not error for plaintiff to have designated the appeal as from the June 4, 1982 entry of judgment.

reasonable jury could find the Bureau acted with deliberate indifference, thereby justifying entry of judgment n.o.v.

A.

Law of the Case

1. Mandate of Prior Decision

Under one prong of the law of the case doctrine, "When an appellate court has once decided an issue, the trial court, at a later stage of the litigation, is under a duty to follow the appellate court's ruling on that issue." United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977); see 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478, at 792-93 (1981). This doctrine applies to issues that have been decided "either expressly or by necessary implication." Munro v. Post, 102 F.2d 686, 688 (2d

Cir. 1939); see Fogel v. Chestnutt, 668 F.2d 100, 108 (2d Cir. 1981), cert. denied, 103 S. Ct. 65 (1982). Thus if, in Doe I, we decided that there was sufficient evidence to present a jury question on liability under section 1983, that holding would be binding on the lower court.[2]

In arguing that we did in fact hold a jury question on liability existed which precluded the district court from overturning the jury verdict,

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[2]This contrasts with Borger v. Yamaha International Corp., 625 F.2d 390 (2d Cir. 1980), where the appellant had not preserved the sufficiency of the evidence issue. We ordered retrial because of trial errors and explicitly reserved consideration of the sufficiency issue, stating the law of the case doctrine would not prevent appellate review of the evidence after retrial. Id. at 395.

appellant relies particularly on the following language:

> Defendant argues that any errors committed by the trial court would have been harmless because plaintiff's case was so weak that it should never have gone to the jury. We disagree. This is a complicated and difficult case. Whether the Catholic Home Bureau's omissions were the product of deliberate indifference and proximately caused any portion of Anna's abuse were questions of fact to be resolved by the jury.

649 F.2d at 149.

The Bureau characterizes this passage as mere dicta. We do not so regard it. Although the decision to remand for a new trial was based on a finding that certain jury instructions and evidentiary rulings were erroneous, the plain language quoted above indicates that the sufficiency of the evidence question was presented to and decided by the earlier panel. Furthermore, 28 U.S.C. § 2111 (1976) directs appellate

courts to disregard harmless error.[3] It would have been unnecessary to remand for a new trial because of erroneous jury instructions and evidentiary rulings if plaintiff's evidence on liability (including that proffered and improperly excluded) was insufficient under section 1983 as a matter of law.[4] It is therefore clear that Doe I held plaintiff presented sufficient evidence

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[3]That section provides in pertinent part: "On the hearing of any appeal . . . , the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[4]Similar reasoning was used by the court in Pyramid Life Ins. Co. v. Curry, 291 F.2d 411, 413 (8th Cir. 1961). See also Otten v. Stonewall Ins. Co., 538 F.2d 210, 213 (8th Cir. 1976) (when earlier panel remanded for new trial based on erroneous jury instructions and rejected appeal of j.n.o.v. motion in a footnote, that opinion was construed as reaching sufficiency of the evidence question because court would not otherwise have reached new trial issue).

to go to the jury. Accordingly, resolution of the sufficiency issue became part of the law of the case.

There is some authority in other circuits which would permit the district court to enter a directed verdict or j.n.o.v. if there was substantially different evidence at the second trial. See, e.g., Otten v. Stonewall Insurance Co., 538 F.2d 210, 212 (8th Cir. 1976); Johnson v. Bernard Insurance Agency, 532 F.2d 1382, 1383-84 (D.C. Cir. 1976); Pyramid Life Insurance Co. v. Curry, 291 F.2d 411, 414 (8th Cir. 1961).

We need not decide whether to adopt that precedent here, see United States v. Fernandez, 506 F.2d 1200, 1202-03 (2d Cir. 1974) (trial court has no power to alter mandate of the appellate court based on "new evidence"), because we reject the Bureau's contention

that there was substantially different evidence presented at the second trial of this case. We have examined the records of both trials and conclude the evidence at the second trial was not substantially or materially different. The core of plaintiff's case pertinent to the issue of deliberate indifference was very similar at both trials and, if anything, was probably stronger at the second trial.[5] Although the defendant Bureau called several new witnesses at the second trial, there was little, if any, material new evidence that would justify departure from the law of the

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[5]For example, the evidence concerning Mr. Senerchia's 1976 allegations about the sexual acting out of Anna's foster sister which had been erroneously excluded from the first trial was introduced in the second trial.

case.[6] Merely cumulative evidence does not constitute such a justification. See First National Bank v. Material Service Corp., 597 F.2d 1110, 1116 (7th Cir. 1979).

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[6]One witness' testimony went only to the question of damages. The testimony of Sister Una McCormack, a Bureau executive administrator, and of Dr. Lewis, the psychologist who interviewed Anna in January 1975, added little to the case records and reports that had been introduced at the first trial. Dr. Lewis referred often to her reports during the course of her testimony and Sister Una had little independent recollection of the January 1975 events. Sister Una had no active involvement in the case again until August 1977 when Mrs. Senerchia made her disclosure to the Bureau. Ms. Dellaverson, the caseworker from the summer of 1975 until May 1977, also testified. Her case records were in evidence at the first trial, and her testimony was arguably new primarily in her assertion that she had visited the foster home every three weeks during this period, a fact at variance with her case records. This contradicted testimony cannot justify taking the question from the jury.

2. Reconsideration of Prior Appellate Decision

Appellee Bureau urges that if we find the prior decision controlling on the district court, we should nevertheless reconsider it. A second prong of the law of the case doctrine, however, encompasses "adherence by an appellate court to its own decision at an earlier stage of the litigation." United States v. Cirami, 563 F.2d 26, 33 n.6 (2d Cir. 1977). As we have noted on numerous occasions, we view this aspect of the law of the case doctrine as one of sound, albeit not inexorable, practice. See, e.g., Rolf v. Blyth, Eastman Dillon & Co., 637 F.2d 77, 87 (2d Cir. 1980); Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 (2d Cir. 1979) (Crane III); United States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974). Accord Insurance Group Committee v.

Denver & Rio Grande Western Railroad Co., 329 U.S. 607, 612 (1947). We have repeatedly stated we will not depart from this sound policy absent "cogent" or "compelling" reasons. See, e.g., United States v. Fernandez, 506 F.2d at 1203-04; Dale v. Hahn, 486 F.2d 76, 81 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1974). The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478, at 790 (1981) (footnote omitted); see Melong v. Micronesian Claims Commission, 643 F.2d 10, 17 (D.C. Cir. 1980); White v. Murtha, F.2d 428, 431-32 (5th Cir. 1967).

In the previous section we discussed and rejected the Bureau's new

evidence claim. We similarly reject the Bureau's characterization of the prior appellate decision as clear error leading to manifest injustice.[7]

We turn then to the Bureau's claim that the intervening decision in Youngberg v. Romeo, 102 S. Ct. 2452 (1982), has altered the applicable standard of liability under section 1983.[8] Romeo involved a section 1983 damage suit. The Court held that mentally retarded persons involuntarily

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[7]The Bureau contends that the previous panel clearly erred in finding certain jury instructions misleading and in requiring other instructions. We disagree for the reasons set forth in the earlier opinion. See Doe I, 649 F.2d at 141-47.

[8]The Bureau's further contention that the decision in Parratt v. Taylor, 451 U.S. 527 (1981), has changed the controlling law has no merit. Parratt involved a state prisoner's section 1983 suit for negligent loss of a hobby kit. Unlike this case, only mere negligence was asserted, and the deprivation complained of was a property loss.

confined in a state institution for the retarded have substantive rights under the due process clause of the Fourteenth Amendment. The Court stated that professional caretakers violate these rights "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 2462 (footnote omitted). In so stating, the Court adopted what is essentially a gross negligence standard.

Even if the Romeo standard of liability is applicable outside of an institutional setting, it is not more favorable to the Bureau than the deliberate indifference test which was applied in Doe I. The deliberate indifference test stemmed from the

decision in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), where the Court held that deliberate indifference to a prisoner's serious medical needs constituted cruel and unusual punishment under the Eighth Amendment and stated a cause of action under section 1983. The Romeo Court, however, stated that it was error to apply the deliberate indifference standard when considering the due process rights of retarded persons involuntarily committed. 102 S. Ct. at 2456 n.11. Such persons are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." 102 S. Ct. at 2461 (citing Estelle v. Gamble, 429 U.S. at 104). Thus the standard of liability which Anna was required to meet in this case may have been stricter than that suggested by the Romeo opinion.

Consequently, we reject the Bureau's assertion that the Romeo decision has effected a change in the controlling law so as to make our prior decision clear error,[9] and hold that the plaintiff was entitled to her jury verdict under the law of the case.

B.

Propriety of Judgment n.o.v.

Alternatively, we hold that entry of judgment n.o.v. for the defendant Bureau was unwarranted because the record contains sufficient evidence from which a jury could reasonably find deliberate indifference. The standard

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[9]"Mere doubt" of such a change is insufficient to open a matter for full reconsideration. See Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 103 S. Ct. 65 (1982); Zdanok v. Glidden Co., 327 F.2d 944, 952 (2d Cir.), cert. denied, 377 U.S. 934 (1964).

for grant of judgment n.o.v. has been recently articulated as follows:

> [T]he trial court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. Rather, after viewing the evidence in a light most favorable to the non-moving party (giving the non-movant the benefit of all reasonable inferences), the trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Howes v. Great Lakes Press Corp., 679 F.2d 1023, 1030 (2d Cir.) (quoting Mattivi v. South African Marine Corp., "Huguenot," 618 F.2d 163, 167-68 (2d Cir. 1980)), cert. denied, 103 S. Ct. 452 (1982). The trial court in this case premised its decision on the second

ground referred to in Howes. It relied particularly on the facts that Bureau personnel had often visited the plaintiff and the foster home and had provided or arranged for many general services for Anna's care, such as tutoring and medical services, and furthermore that Anna expressed no discontent with her placement and, to the contrary, indicated her desire for adoption. The judge characterized as at most "mere negligence," "poor judgment" or "somewhat careless" the Bureau's failure to comply with periodic reporting requirements, its failure to visit the foster home during at least two lengthy periods and its failure to report Dr. de Alvarado's suspicions of sexual abuse which the judge considered to be "almost equal to a guess." In so ruling, the court usurped the function of the jury.

In Doe I we stated that an agency could be held liable under section 1983 if "its top supervisory personnel . . . exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." 649 F.2d at 145. In Doe I we referred to two separate theories of liability which could be applied here. One theory is predicated on the Bureau's failure to comply with specific statutory duties, such as to report all suspected child abuse to the Department of Social Services.[10] Id. at 145 & n.8. This

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[10] See N.Y. Soc. Serv. Law § 413 (McKinney Supp. 1982). We also noted that a March 1975 memorandum of Assistant Commissioner Parry interpreting this requirement and reminding agencies of this duty stressed that any error

duty was characterized as "specific" and "unequivocal," and the Bureau's failure to act furnished a plausible basis for the jury to infer deliberate indifference. We also held that liability could be based on inferring deliberate unconcern "from a pattern of omissions revealing deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse." Id. (citation omitted). Moreover, the failure to report could be taken as "incremental documentation of a pervasive pattern of indifference."[11] Id. at 146 (footnote omitted).

The fact that the agency may have been attentive to Anna's general

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should be on the side of reporting. Doe I, 649 F.2d at 147 n.13, 147-48.

[11]We also noted that New York law defines keeping a child out of school as child abuse. See Doe I, 649 F.2d at 146 n.12.

care and provided Anna with general services did not preclude a jury finding c deliberate indifference respecting one very significant aspect of her welfare the protection from abuse. See Murrell v. Bennett, 615 F.2d 306, 310 n.4 (5th Cir. 1980) (one episode of gross misconduct with respect to prisoner's medical care not necessarily excused by general pattern of attentiveness). Furthermore, although Anna's silence about her abuse is uncontested, the record contains expert testimony that abused children typically do not come forward and usually wish to remain in the home. Even defendant's expert agreed that plaintiff's desire for adoption was not inconsistent with her having been physically or sexually abused. The jury could infer that childcare professionals should know this fact, especially when their own expert

psychiatrist informs them she believes abuse is occurring[12] and the child is viewed as passive and of limited intelligence by agency personnel. None of the facts relied on by the trial court justified its overriding of the jury's verdict.

A reasonable jury could have inferred deliberate indifference by the Bureau from the following evidence: the failure to report suspected child abuse

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[12]The trial judge's characterization of Dr. de Alvarado's opinion as a "guess" is unwarranted since Dr. de Alvarado used accepted clinical methods, i.e. observation of reactions and familiarization with case history. Although the trial court construed the record as showing that the Bureau found Dr. de Alvarado's opinion to be unjustified, from the facts presented to it, the jury could have concluded that Bureau personnel should have evaluated Dr. de Alvarado's suspicion in light of her extensive psychiatric clinical experience over a twenty year period, as distinguished from that of Dr. Lewis, the agency psychologist, who had received her doctoral degree in January 1975, the same month she interviewed Anna and Mr. Senerchia.

to relevant authorities after being informed in March 1975 of Dr. de Alvarado's opinion, especially when viewed against a background of unusual cirmcumstances surrounding Mr. Senerchia's removal of Anna from school; the failure after the April 10, 1975 staff conference to carry out any further investigation of possible sexual abuse; the failure to verify Mr. Senerchia's allegations of Anna's sexual acting out in school with school authorities; the failure to take action after school officials informed the Bureau that the events described by Mr. Senerchia could not have transpired and after Mr. Senerchia changed his story significantly; acquiescence in Anna's remaining out of school for an entire semester; the failure to conduct any home visits between December 1974 and May 1975; the failure to report Anna's

school absence, alleged sexual acting out or Dr. de Alvarado's abuse suspicion in the June 1975 annual report to the Department of Social Services; the failure to take decisive action in 1976 when Mr. Senerchia reported markedly similar sexual acting out by Anna's foster sister; and the failure either of Bureau personnel to provide Dr. Piana with adequate information or the failure of Dr. Piana, in light of the information given, to question Anna concerning sexual abuse in his March 1977 interview. As an appellate court, we do not sit to evaluate the validity or plausibility of the Bureau's explanations for its actions. There was sufficient evidence for the liability issue to be presented to the jury, and the jury made its decision.

III.

We conclude that the law of the case established by the earlier appellate decision in Doe I precluded entry of a judgment n.o.v. for the defendant at the second trial and that no compelling reason has been established to justify our reconsideration of that decision. In any event, entry of judgment n.o.v. was erroneous because there was sufficient evidence for a jury finding of liability under section 1983.

Consequently, we reverse and remand for reinstatement of the jury verdict.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARIE DOE, et al.,

Plaintiffs,

v. 79 Civ. 1884(CLB)

CATHOLIC HOME BUREAU
FOR
DEPENDENT CHILDREN,

Pefendant.
----------X

June 3, 1982
4:30 p.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES:

LANSNER & WENDT
Attorneys for Plaintiffs
DAVID LANSNER
CAROLINE KUBITSCHEK of Counsel

FREDERICK J. MAGOVERN
Attorney for Defendant
LOUIS MARTINE, of Counsel

I would like to say in response to Mr. Martine that all of the facts which were before the jury in this case were also before the jury in the first trial. The Court of Appeals in reviewing all of that testimony and all of those documents said this was a case that had to go to the jury and I believe that this court is bound by that.

THE COURT: Is there a particular line of the decision that you are quoting from?

MS. KUBETSCHEK: Yes, your Honor, the last paragraph of the decision, of the majority opinion, your Honor. It is on page 149, I believe.

THE COURT: I believe I left my copy upstairs.

MR. MARTINE: You may have ours, your Honor.

THE COURT: You may continue, Ms. Kubitschek.

MS. KUBITSCHEK: Your Honor, I have nothing to add. All of my arguments are in the memorandum of law.

THE COURT: I think I ought to address myself first to that point. You may be seated, if you like.

The court reads the language there which says as follows and I think the whole paragraph has to be read in context:

"The defendant, that being the Catholic Home Bureau, argues that any errors committed by the trial court"--and I insert parenthetically they mean errors in the charge or ruling on the admissibility of evidence--continuing the quotation,

> would have been harmless because plaintiff's case was so weak it should never have gone to the jury. We disagree. This is a complicated and difficult case. Whether the Catholic Home Bureau's omissions were the product of deliberate indifference

> and proximately caused any portion of abuse were questions of fact to be resolved by the jury.

Thereafter, the panel majority reversed and remanded for a new trial. The court treats that literally, but does not believe that the effect of that language or its intention would necessarily sterilize the power of this court to make a ruling on the merits on a motion for judgment NOV. Were it so, they would have told us.

It is conceivable that a motion for a new trial would have been made by plaintiff and the court would certainly have had jurisdiction to hear that if there had been a defendant's verdict. The Court of Appeals opinion does not say how the jury must resolve the case on retrial or what this court's reaction to that resolution must be on a Rule 50(G) motion, nor could it do so.

I do believe that it is fair to say that the cse was probably tried better by plaintiff the second time. That much of the argument of Ms. Kubitschek here today is valid. However, I do not regard this opinion as constituting such law of the case in this matter as to remove this court's power to act on this motion in accordance with this court's view of the law and the facts.

The court believes that the point is regulated by the second alternate basis set forth in the Court of Appeals opinion in Armstrong v. Commerce Tankers Corporation, 423 F.2d, 957 at page 959, and I think I will read the quotation entirely:

It says

> Whether the motion is one to direct a verdict or to set aside a verdict, which the jury has returned, the test applied by the court is the

> same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if, one [and I will omit a reading of one because it is inapplicable here] or, two, the evidence is so strongly and overwhemingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against him.

Now, in this case the plaintiff, Anna Piniero Faria, who is referred to in most of the papers as Anna Doe, alleges that the defendant, Catholic Home Bureau, violated her civil rights and the Court of Appeals in its prior opinion in this very case said:

> There are two fundamental requisites for Section 1982 liability to be imposed. The first is that the omissions must have been a substantial factor leading to the denial of a constitutionally protected liberty or property interest. The second is that the officials in charge of the agency must have displayed a mental state of deliberate indifference in order to

> meaningfully be termed culpable under Section 1983.

There is a quotation within the quotation there which I have omitted to note.

That is the applicable law in this case. Now, this court instructed the jury that mere negligent care or negligent oversight or poor judgment by a child care agency does not constitute deliberate indifference and, therefore, will not arise to the level of a constitutional violation sufficient to justify a plaintiff's verdict in an action based on a federal claim.

There must be more than simple negligence, carelessness, unintentional fault, inaction or poor judgment. A deliberate misfeasance or deliberately indifferent action by the defendant, which is required for the plaintiff to recover, presents a state of mind

distinct from that present in a case of mere negligence, simple carelessness or poor decision-making.

The key question in this case on the issue of liability is whether the state of mind of the defendant's staff was such that the defendant, as a corporate body, or equivalent to a corporate body, was deliberately indifferent to the consequences of its actions and its failure to act insofar as concerns this plaintiff.

If only simple negligence and not deliberate indifference is established, then the plaintiff cannot recover in this court because the pendent state law negligence claim was severed and dismissed on the eve of the previous trial in this case. The order granting that relief to the defendant was not appealed and, indeed, this court notes that Mrs. Faria has and is

presently pursuing her state claims in the state courts.

It is too late at this time to argue whether they should have been regarded as pendant claims or whether it was an abuse of discretion to sever and dismiss them. That is not before me.

I have reviewed to the facts at trial and I find that it was established and is uncontroverted that the defendant's staff visited the plaintiff, her foster parents and the foster home on many occasions, provided extensive additional matters of care, including tutoring and medical and psychological and psychiatric examinations and treatment and other services for the plaintiff.

Many of these items are listed in the defendant's affidavit in support of this motion. The totality of the trial record shows considerable effort

over the years on the part of this agency which might be characterized as beyond the call of its statutory duty. These items are uncontested.

Over the years the plaintiff, even as she gained maturity, spoke favorably of her foster home, her case workers and her foster parents and sought adoption by the foster parents.

Now, there is also present in the otherwise favorable picture three other facts. One of them is that over the years this defendant failed to complete or submitted late various documents and other paperwork required by the city, state and federal regulations.

Secondly, during several periods of time, one of which was lengthy, the defendant failed to have its case workers visit the foster home and examine the living conditions there.

And, also, the defendant did not report the plaintiff's case to the New York City Department of Social Services as a suspected case of child abuse. Dr. de Alverado drew the inference and expressed the opinion, almost equal to a guess, that the plaintiff was "sexually involved" with her foster father.

Even the words, which Dr. de Alvarado's report contains, do not necessarily indicate by themselves child abuse, although they are suggestive that the placement should have been changed or reviewed.

The defendant does not deny that it failed to complete some of the paperwork or submitted documents late. The evidence at trial does show that while the home may not have been formally visited, the plaintiff was seen by defendant's staff during these periods,

and essentially we come down to what the court regards as the controlling and uncontroverted evidence here, which is that the responsible staff and officers of the agency, defendant, formally and informally reviewed Dr. de Alvarado's inference or opinion and found it to be unjustified and unsupported and they disagreed with her.

As a group and individually they exercised judgment and it turned out, at least tested by hindsight, that this was poor judgment.

In addition, the plaintiff presented uncontradicted evidence that the foster father interfered with the defendant's attempts to visit the plaintiff's home, foster home, and gather other information.

Because the home appeared to be a happy one and the plaintiff appeared content, the defendant's people were

apparently hesitant to harass the foster parents or disturb the family environment and attempted thereby and thereafter to minimize intrusiveness to inspect the family unit.

I regard this as mere negligence, even when tested by hindsight, which is not a proper standard in determining the reasonableness of the actions of persons resulting in damage even in a negligence case, which this is not.

The court finds and concludes that considering these facts particularly and all the other facts established by the totality of the evidence at trial, viewed in the light most favorably to the plaintiff and resolving all issues of credibility in her favor, the evidence could not possibly support a verdict in favor of the plaintiff on liability as a federal civil rights action within the

rubric of the Court of Appeals opinion in this very case.

I note that I do not question the jury's good faith or the jury's determination on the issue of damages. It is only the issue or the finding of civil rights liability which is the subject of a valid motion on the part of the defendant. Although the defendant may have been somewhat careless in its paperwork and may have used bad judgment in its resolution of the opinion tendered to the staff by Dr. de Alvarado, there was insufficient proof in the totality of the facts in this record to permit a reasonable juror to infer that the agency operated with a state of mind of deliberate indifference.

The jury may have been able to find the defendant guilty of simple negligence. The court, as I noted earlier, is making no finding on that

point and that issue is not before us and the plaintiff's negligence claims are not pending here any more, but they are pending in the state court, which has the power to deal with them.

This is a case which cries out for justice for the unfortunate abuse to which this plaintiff was subjected by Mr. Senerchia. The court cannot help but feel a great deal of concern and sympathy over what was developed here in the evidence at trial. The court has to focus on the law having to do with the case as established by the Court of Appeals and must put out of its mind the case founded on mere negligence or any claims founded on poor judgment, which do not rise to the level of civil rights violation.

If the court, out of concern for this case, allows this verdict to stand on the issue of liability, then

there is no end in sight. It was not the intention of Congress, nor the Supreme Court, that Section 1983 claims swallow up all errors of judgment of omissions or bad judgment exercised on thr part of state officials, noting that this agency is, as a matter of law, exercising state action in its administration of the plaintiff's placement.

The court will grant the motion for judgment notwithstanding the verdict and will direct that judgment be entered in favor of the defendant on the issue of liability.

The court will direct that no costs be awarded to defendant. The court specifically declines to order, alternatively, that there be a new trial. The court does not believe that the verdict is a product of passion or indignation on the part of the jurors. The jury verdict may reflect in part an

element of superior advocacy at trial on the part of the plaintiff's side of the case, and that is certainly not unusual in litigation.

The court believes that juries generally and this jury are particularly able to assess monetary damages for personal injuries and for pain and suffering and for the shame and hurt that followed from the injuries inflicted on this plaintiff by this non-party Mr. Senerchia and the court would not disturb the damages as fixed by the jury and would not and will not grant a new trial alternatively.

The court does find that the evidence on the issue of liability is so strongly and overwhemingly in favor of the movant that a reasonable and fair-minded juror in the exercise of impartial judgment could not arrive at a verdict of liability. The court does not

believe that the verdict of liability having been reached in the fashion in which it was, tainted or affected adversely in anyway the portion of the jury's deliberations directed to damages.

Should a higher authority conclude that this court is wrong on the issue of liability in its evaluation fo teh evidence, then the amount of the damages as awarded should stand and, of course, in that event th eplaintiff would be entitled also to recover her legal fees and costs.

The court finds this to be a very sad and moving case. The court has urged the parties to try to resolve it, bearing in mind that they have a negligence case across the street which eventually must be reckoned with. The court certainly cannot require the parties to do it, but my duty to the next case, which will come up in this

court, requires that the court focus its considerations on the law and whether the evidence in this trial was sufficient to support a finding of deliberate indifference, and I find beyond doubt it was not sufficient to do that and that there was no basis upon which a finding of deliberate indifference here on the part of the entity could be found by jurors acting reasonably, and that is essentially a finding which in the state court system would be described as being found as a matter of law.

Now, at this time I will entertain requests for additional or further findings and will dispose of the motion accordingly and direct the clerk to enter a judgment as directed by the court NOV in favor of defendant without costs.

Now, I will ask you first, Mr. Martine, do you have other or

additional requests for the court to find?

MR. MARTINI: I do not, your Honor.

THE COURT: All right, the court will ask Ms. Kubitschek whether there are additional findings that you would like to have the court make?

MS. KUBETSCHEK: Yes, your Honor. I would like the court to make a finding that the Catholic Home Bureau was negligent.

THE COURT: The court expresses the personal belief that a reasonable jury could find that they were negligent. The court regards the request to find as being outside the scope of the pleadings in this action and not an issue which was properly litigated in the case. So that the matter may be taken in context, it is my own view that if I were a trier of the fact, I could reasonably find mere

negligence here, failure to exercise reasonable care in light of the known risks and undoubtedly would do so had that matter been litigated before me as the trier of the fact.

However, it was not, and it was not so submitted to this jury and it was not an issue which this court can resolve and anything I might say on the point certainly is not an estoppel by judgment when you ultimately try your case across the street in the state system.

I think such a finding would be justified on this trial record.

Anything else?

MR. MARTINI: Nothing on behalf of the defendant, your Honor.

THE COURT: Anything else?

MS. KUBITSCHEK: No, your Honor.

THE COURT: I will say it again. I think counsel who represented this young lady did a fine workmanlike job and this court occassionally has an unpleasant duty, but it is still my duty.

Thank you all very much.

* * * * *

CHARGE OF THE COURT

(Pollack, J.)

Mrs. Chapman and ladies and gentlemen of the jury, it is important to keep your attention on what you must decide in this case and not allow yourselves to be diverted to other questions, no matter how interesting.

We've been presented with a picture of an unfortunate family, the family Pinairo. The mother, suffering from a psychiatric illness with frequent hospitalizations therefor, gave birth to five children. The father, suffering from a chronic drinking problem, held only sporadic employment. Unable themselves to care for and bring up their children, they turned four of them over to the City's Department of Social Services for foster care. Later they gave up three of them for adoption and two were adopted.

In this case we are concerned with only one of the five children, the girl Anna. She is the only plaintiff before you. She is suing not the Senerchias but the Catholic Home Bureau, a child care agency, which we are told oversees 1,000 to 1,500 children during the course of the year.

The complaint against the Bureau is that it knowingly and intentionally allowed Anna to be mistreated in the foster home in which the Bureau placed Anna, the home of Mr. and Mrs. Senerchia in Staten Island, and that this violated Anna's constitutional right to be free from the infliction of physical and mental harm.

Now, children in legal custody of the Commissioner of Social Services have the right to receive proper care and supervision under federal law and the right not to be subjected to physical

or mental mistreatment under state law.

Anna was born April 22, 1961. When she was about two and a half years old, the Pineiros gave her up to the City Department of Social Services to place her in foster care. The Department of Social Services turned her over to an agency, the Catholic Home Bureau, which finds foster homes for such children in which to live and be supported and grow up.

The Bureau located the home of the Senerchias. Mr. Senerchia was a policeman. His wife was a home maker. They had their own four children. Their home was recommended to and certified by the authorities as eligible to take in and care for foster children. They took in four foster children.

Anna remained with the Senerchias for nearly fourteen years,

until August 1977. Meantime she was housed and fed and clothed and, when old enough, sent to school, given outside tutoring assistance, canoeing trips or camping trips, medical attention, and lived with a younger sister and other children in the house.

When she reached her teens, Anna wanted to be adopted by the Senerchias, but the agency was not willing to sanction this. There was a question, even though the psychiatrist seemed to believe that the Senerchias could handle it. Mr. Senerchia had had two major heart attacks.

Questions arose concerning Anna's conduct at school, and the Bureau, which had been following up Anna's progress through a psychologist, decided that Anna should be seen by a psychiatrist, Dr. de Alvarado, to whom Anna was referred, according to

the doctor's report, for psychiatric evaluation as a part of an overall effort to understand her situation in her foster home and her alleged conduct at school. She was then fourteen years old.

Anna was seen by the psychiatrist on March 19, 1975. The doctor's report is in evidence and you heard it read from. Anna told the doctor she had come to the doctor to find a different school, any kind of school. Dr. de Alvarado's report contains other matters, including that she had lied aboaut her activities, and Dr. de Alvarado recommended that Anna be placed in an institution. But the administrative staff, on review, saw no reason to put Anna away in an institution.

You have to say, from what has been received in evidence, what the truth is and to judge this on all the evidence and explanations you've heard,

including the emotional and mental condition of the parties involved and their capacity to tell you what the facts are.

At all events, for the purposes of this case the plaintiff seeks to claim that the conduct of the Catholic Home Bureau indicated that it intended that Anna should be mistreated by her foster father or at least was purposely indifferent to whether or not she was being mistreated by him. We have the notes of the Bureau, the case workers' and supervisors' notes made during the years, and the testimony of the witnesses to give us a running account of events from which you may glean whether there was any intention to allow Anna to be mistreated in the foster home.

You have received the information of the doctor's vaginal tests following the alleged episodes related

to have occurred in August 1977. You may wish to consider this together with all the other evidence in appraising the credibility of what you have been told by the various witnesses.

The evidence, as I recall--and I will explain to you that everything I have said or will say about the evidence is only my recollection, which is not in any way binding on you since your recollection and interpretation of the evidence controls here. I started to say that the evidence shows that on August 23, 1977 Mrs. Senerchia triggered the action that the Bureau took on that very day. On August 23, 1977 the Bureau barred Mr. Senerchia from the home and within a matter of days moved Anna from that home to the home of Mr. and Mrs. Mount, the daughter and son-in-law of Mrs. Senerchia, closing the Senerchia home as a foster family shelter.

Within a short time Anna found the restrictions imposed by the Mounts, Mr. and Mrs. Mount, on her movements to be onerous, or irksome, and asked to be placed elsewhere. She was promptly relocated in the Bronx home of Mr. and Mrs. Melendez. That lasted only a short time. Mrs. Melendez and Anna came to blows, Anna having struck Mrs. Melendez the first blow, and that ended Anna's stay there. Anna was now seventeen years old. She decided to go to the home of her natural parents, the Pineiros. But that too ended shortly, and Anna voluntarily went back to the home of Mr. and Mrs. Mount, with whom she had a good relationship.

Along about here she met Mr. Faria and married him on November 13, 1978. Their child was born on June 6, 1979. She now lives in Georgia.

Anna seeks in this case money damages from the Catholic Home Bureau, claiming that it is responsible for Mr. Senerchia's mistreatment of her physically and sexually. As I've told you during the trial, this is a federal case, in which the plaintiff must prove that her constitutional rights were violated by the Bureau. That requires the plaintiff to prove that the defendant knowingly and intentionally harmed the plaintiff or deliberately, with knowledge that she was being mistreated in the foster home, intentionally permitted this to occur or were intentionally indifferent to whether it was occurring.

The Catholic Home Bureau is not to be held liable because it did or didn't report what was going on in school or elsewhere to the Department of Social Services. That is no part of Anna's constitutional rights. That is between

the Home Bureau and the Department of Social Services. Whether they acted wisely or not and whether they had or did not have duties to the Department of Social Services is not the issue here.

In a federal court case, negligent care or negligent oversight by a child care agency or foster parents does not prove a claim for deliberate mistreatment, does not prove a constitutional claim. Negligence or carelessness or unintentional fault do not constitute violation of a constitutional right. If that occurred, the defendant is entitled to your verdict.

In short, the plaintiff in this type of case, in order to recover, must establish with credible evidence, believable evidence, that the defendant on trial knowingly and intentionally closed its eyes to and permitted or

knowingly and intentionally caused the mistreatment which the plaintiff says violated her rights.

Mr. Senerchia, as I have said, is not the defendant who is being sued here. Whether you approve of him or don't approve of him is not to be held against the Catholic Home Bureau. This means that the plaintiff must prove that the defendant intended the actions or failures to act of the Senerchias, and did so deliberately and voluntarily, and that this proximately caused the mistreatments complained of. Hindsight, of course, is superior to foresight. But the conduct is not to be judged by a wisdom born after the event, where deliberate conduct is the kind of conduct you must find to have occurred in the first place.

You, the jury, are the sole judges of what the facts are that were

credibly proved. Your recollection of the evidence controls, not my recollection or statements of what I recall of the evidence, not the statements, arguments or recollection of the lawyers or how they put the evidence together. What did you find the witnesses and exhibits to say? What did you believe about what was said and written? That is the evidence that controls.

On the other hand, you must accept what I tell you is the rule of law, what must be proved to make out a case. You can't depart from the law as I give it to you, whether or not you agree with it. Otherwise you would be false to the oath that you took when you accepted service on this jury and raised your right hand and said that, so held you God, you would well and truly try this case on the evidence and on the law.

The burden is on the plaintiff, in a civil action such as this, to prove every essential element of her claim by a fair preponderance of the evidence that you credit as truthful. If the proof should fail to establish any essential element of the plaintiff's claim by a fair preponderance of the evidence, then you are to find for the defendant.

The defendant, when called into court, has no burden to prove anything. It has no burden to sustain, with respect to the plaintiff's claim, on the issue of liability. It is not bound to prove anything. A defendant who comes into court need not even present any proof or any witnesses. It is the plaintiff who must prove her case by a fair preponderance of the credible evidence.

A defendant may rest on the inadequacy of the plaintiff's proof, if any there be, on the failure to convince a jury by a fair preponderance of the credible evidence that the plaintiff's claim is true.

To establish a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the credible evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not.

Now, judges, when they charge a jury, sometimes explain this by an apothecary scale, a scale that you find in a drugstore. If the evidence in the case, when weighed on one side, preponderates, goes down, if the scale goes

down with the weight of it beyond the middle line, and that evidence is credited by you, that is a preponderance of the credible evidence.

If, however, the evidence is evenly balanced so that you can't decide one way or the other its convincing force, whether its convincing force is greater than the inferences and convincing force of the evidence on the other side, then the case has not been proved; it remains in balance.

And similarly, if the evidence against the case weighs more heavily than the evidence for the case, the case has not been proved. So that it is only when the evidence preponderates over the evidence on the other side that the plaintiff has established a claim.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the

case, the jury may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits, regardless of who may have produced them.

Mention has been made that a gynecologist was not called. The failure to call a witness who was equally available to both sides may be taken against both sides or not at all.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an alleged eye witness, and the other is indirect, or circumstantial, evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and

circumstantial evidence. It simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under those circumstances, the statements that they have made by way of opening or by way of summations will not be taken as evidence. It is argument. That is all that is. However, the court and the law do permit you to take the arguments that they have proferred to you and weigh those arguments.

Likewise, the mere fact that the plaintiff has filed a complaint against the defendant is not evidence of anything, and no inference may be drawn by the filing of the complaint. The complaint is merely a procedural device

by which a claim is placed before you. It is the evidence and the law which ultimately determine the merits and sufficiency of the allegations of the complaint.

You, as jurors, are the sole judges of the credibility, the believability of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of a witness or by the manner in which the witness testifies or by the character of the testimony given or by evidence to the contrary of the testimony given. You may disbelieve evidence, whether or not it is directly contradicted. You should carefully scrutinize all the testimony given, the circumstances under which each witness was called and has testified, and every matter in evidence which tends to show whether the witness is worthy of belief.

You will consider the uniform admissions on the witness stand by any witness that she has falsified and lied when spoken to and what that means so far as the testimony here, that the contrary was the truth. You will consider each witness' intelligence, motive and state of mind and demeanor and manner while on the witness stand. You will consider the witness' ability to observe the matters as to which he or she has testified and whether the witness impresses you as having an accurate recollection of those matters. You will also consider any relationship each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses is not an unknown phenomenon and it may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see and hear it differently. An innocent misrecollection, like a failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance on the question you are deciding or on an unimportant detail, and whether the discrepancy results from innocent error or the rush of events or intentional falsehood.

A witness may be discredited, or impeached, by contradictory evidence or by evidence that at some other time

the witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. Again, you must appraise the nature of the discrepancy. Does it pertain to a matter of importance on the question you are deciding or some trivial, unimportant or collateral detail?

Recollections and recitals of events and observations are likely to vary from person to person in the retelling, and such variance is sometimes a better indication of frankness than a schooled version of events. Sometimes it is also an indication of untruthfulness.

If you believe any witness has been impeached, and thus discredited, on a material matter, it is your exclusive province to give the testimony of that witness such credibility, if any, as you

think it deserves. If a witness has been shown knowingly to have testified falsely concerning a material matter, you have a right to distrust such witness' testimony on other particulars, and you may, if you wish, reject all the testimony of that witness and give it only such credibility as you may think it deserves.

An interested witness is not necessarily less credible than a disinterested witness. The fact that the witness is interested in the outcome of the case does not mean that the witness has not told the truth, and it is for you to determine from the witness' demeanor on the stand and such other tests as your experience dictates whether or not the testimony has been colored intentionally or unintentionally by interest.

If you find that the plaintiff is entitled to a verdict on her claims against the defendant Catholic Home Bureau, then you would have to consider the element of damages. The fact that I am about to instruct you on the measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance.

I don't know how you are going to decide the question of liability. If you have found that the defendant is not liable to the plaintiff, that would end your task and you need go no further and you would report your verdict of no liability. It is only because I don't know what you will decide that I have to give you the additional rules, which I

refer to as instructions on the law of damages.

Again, the burden of proof on the subject of damages is solely on the plaintiff, the person who asserts the claim. The damages claimed by the plaintiff fall into two categories, one known as compensatory damages and the other known as punitive damages. These are distinct claims that you would consider separately. If you find that the plantiff is not entitled to a verdict, then you need not consider the damage elements of the claims.

I am first going to give you the elements which you may consider in assessing any compensatory damages, if you find that such damages should be assessed. The basis is that you will assess, if you find liability, the plaintiff's damages at such an amount as in your sound judgment and discretion

would fairly and honestly compensate the plaintiff for injuries, if any, resulting from and proximately caused by the defendant's actions, if any, that were deliberately intended to bring harm to Anna.

There is no fixed rule by which damages may be mathematically computed or calculated. But there are certain compensable elements that a jury may take into consideration. These are, still talking about compensatory damages, the nature and extent of the plaintiff's injuries, if any, whether those injuries are permanent or temporary, and any pain, suffering, fright, mental anguish, physical disfigurement, emotional distress, humiliation, or mental distress, if any have been shown.

You are not to award damages for any injury or condition which the

plaintiff may have suffered or may now be suffering unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the Catholic Home Bureau, that is, causally connected with a fault of the defendant by which the defendant intended harm to come to Anna, or deliberate indifference thereto.

In addition to actual damages, in a case such as this the law permits the jury, under certain circumstances, to award an injured person punitive and exemplary damages, awarded in order to punish a person found to be an intentional wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find, from a preponderance of the evidence in the

case, that the plaintiff is entitled to a verdict for actual or compensatory damages against the defendant, and should further find that the acts of the defendant which were causally connected with the actual injury or damage to the plaintiff was maliciously or wantonly or oppressively done, then the jury may, in a separate award, if in the exercise of discretion they unanimously choose to do so, award such amount as the jury shall unanimously agree to be proper as punitive and exemplary damages.

Your duty is to consider the issues in this case fairly and impartially to both sides, without fear or favor. Your function calls for an exercise of common sense in the light of your own judgment and lifetime experiences.

To return a verdict, it must be unanimous. If during the progress

of your deliberations you desire to see any of the exhibits, or indeed to hear any of the testimony to be read, if you will send out a note signed by Mrs. Chapman, who will be the foreperson of your jury, we will try to accommodate those requests.

Please do not indicate to anyone, not even to me, how you stand until you have arrived at a unanimous verdict. And when you have, you may send out a note to that effect.

I am going to take a moment to talk to the lawyers so that they will have an opportunity to call to my attention anything which they think I may have misspoken on or overlooked. Then I'll come back to you. So, if you will be good enough to relax, I'll talk to them at this time on this side of the bench.

(At the side bar)

THE COURT: I have carefully considered each of the requests to charge in the latest version of the plaintiff's requests and, to the degree that I think it appropriate to integrate the concepts, I have included them in what I consider the appropriate charge. And consequently, to the extent that I have not charged either in the language or in the substance of the charge as submitted by the plaintiff, the plaintiff has an exception.

That will save you a lot of time.

MR. LANSNER: All right.

THE COURT: Are there any further requests?

MR. LANSNER: Yes (handing).

MR. LANSNER: Yes (handing).

I have nothing further to say except to answer any questions the Court may wish to address.

THE COURT: Thank you.

The plaintiff has submitted proposed requests for instructions to the jury, and Request No. 15 accurately and correctly, in the first two sentences thereof, establishes precisely what is requisite here. The plaintiff asks the Court to charge as follows:

> Plaintiff must establish that the defendant "knowingly and intentionally" did the acts or omissions which plaintiff asserts violated her rights. This means that plaintiff must prove that the defendant intended the acts or failures to act and did them deliberately and voluntarily.

There are many things that plaintiff's counsel has argued in his statement to the Court with ample overstatement and, in some aspects, understatement. One interesting matter

has to do with the report of Dr. de Alvarado. The plaintif's lawyer correctly stated that it was her opinion that the child should be taken out of the foster home, but he neglected to state what that doctor recommended, which in mature judgment and for sufficient cause the Catholic Home Bureau rejected, namely removal and placing that girl in an institution.

42 USC Section 1983 establishes a cause of action for deprivation, under color of state law, of any right protected by the Constitution or laws of the United States for the express purpose of enforcing the provisions of the 14th Amendment. The statute covers acts by all those who carry a badge of authority of the state and represent it in some capacity, whether they act in accordance with their authority or misuse it.

The only complaint that the jury could consider is the one against the Catholic Home Bureau. There is no constitutional act in respect of the initial placement. A child's right to be free of injury, where the state or agency is characterized as a tort feasor, which means violating a civil right, does not make out a federal court case. It is not of constitutional dimensions under the civil rights statutes. Paul v. Davis, 424 U.S. 693 (1976).

There is not contention of acts or omissions in bad faith. No scintilla of evidence thereof was adduced, at all events. In this case, it is the burden of the plaintiff to show that the Catholic Home Bureau had an intention to harm the girl or that there was reckless and deliberate indifference to known mistreatment

suffered by her. The agency must be shown to have evidenced deliberate, intentional indifference to serious known misconduct of the foster parents.

To find against the Catholic Home Bureau, a jury would have to say that the evidence is such that the injuries resulted from an official attitude on the part of the Catholic Home Bureau.

Negligent supervision is not something on which a suit can be brought in the federal courts under the Civil Rights Acts, because the law is that such negligent supervision is not a constitutional violation. There are other places that handle that kind of a complaint, the Family Courts and the various state courts.

Negligent supervision is not equated with deliberate neglect, deliberately improper or deliberately

indifferent conduct, which calls for knowledge and awareness of what is going on. There is no evidence in this record whatever of knowledge by Catholic Home Bureau of a pattern of constitutionally offense acts and failure to take remedial steps. Indeed, the contrary is the evidence in this record.

The first reports--and I am not speaking of abstruse, unsubstantiated speculations--of abuse reached the agency on August 23, 1977, and that very day the agency galvanized into action, investigated, barred the father from the foster home, and within days closed the home and removed the children elsewhere.

The courtroom proof, from every witness who testified, was that Catholic Home Bureau was lied to by Anna and her sister, was told by them that everything was all right. They never complained or revealed to anyone any

impropriety of the foster father, not to the case workers, not to the foster mother, not to the school teachers, not to the priests, not to her sister who resided with her, and not to any girl or boy friend or anyone else.

The evidence was inadequate as a matter of law of a constitutional violation. This court is not in the business of administering state created duties or obligations. This case falls hopelessly short of constituting deliberate indifference to the supervision, living conditions, welfare, treatment, or conduct of the foster parents.

The Court of Appeals in this circuit teaches that while juries are entitled to latitude in drawing inferences as to the existence of an official policy, intention to harm and deliberate indifference of an

agency--the standard on a directed verdict on the judgment notwithstanding, the verdict is a difficult one to meet--there are limits to that latitude.

The thing that stands out starkly in this record is that the plaintiff and her sister are admitted liars on whose word no one could rely and who at all events put the Catholic Home Bureau in a frame of mind other than of apprehending impropriety. No report of any misconduct was made to anyone.

In this Court's view, no reasonable person could find, in the light of the evidence adduced at trial, that a federal cause under the Civil Rights Act was made out against the Catholic Home Bureau. Any verdict for the plaintiff could be reached only through passion or prejudice and would have to be set aside as unreasonable.

Nonetheless, I shall allow, under a reserved decision on the motion to dismiss, the parties to go to the jury, to make their argument, but give this indication so that it may not be thought to be an afterthought, should there be a verdict which the Court would regard as thoroughly unjustified and thoroughly improper.

So that the motion to dismiss is at the present time held under a reserved decision and the parties will be allowed to sum up.

I think that, in view of the extensive discussion in this case and the reading of the records and the essentially simple nature of what is involved here, despite the prolix manner in which it was presented, that counsel should limit themselves to a reasonably brief but nonetheless complete argument to the jury, and I would think that

twenty minutes to a half hour for each side would be ample for that purpose.

You may bring in the jury.

(Jury present)

THE COURT: Counsel for the defendant may address the jury.

I'll give you an opportunity to read what I didn't permit you to read. You can make it as part of your summation.

SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY
ın. 22	Jan. 27		Jan.28	re: tutoring	
n. 29[Evelyn W.]		Feb. 5			Feb.26-letter from Mrs. S.
					March 1-letter from School
			March 4-letter to S's[Wong]		
			March 9	re: tutoring	
			March 30	W-853 to DSS sent	
			April 6	Letter to Teacher	
			April 6	Letter to D'Andrea	
			April 14	re: tutoring	
	April 21				
ɔril 30[Wong record]					
			May 13	re: tutoring	
	May 19				
	May 21[Wong record]		May 25	Anna's annual Physical Dr. Salome	
ɹne 16					June 29 letter from Mrs.S
	July 20				
	August 16				
			Sept. 30	cancel foster home visit	
			Oct. 1	re: tutoring	
			Oct. 5	re: Tel Dr. Salome	
:t. 14	Nov. 22 [illegible]	Nov. 26			
			Dec. 10	re: tutoring	

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References are to Caserecord of Anna Piniero FARIA

SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
			Jan 21	letter to S's		
an 24			Jan. 27	Case conference		
eb. 2			Feb. 3	re: tutoring		
		Feb. 22	March 16	Psycho-Social sent to clinic		
			Apr 1 12[Evelyn W. caserecord]	S's at agency		
			Apr 1 18	letter to S's		
April 26		~~April 28~~	May 1	W-853 to DSS		
		May 10	May 10	Anna & Dr. Chu		
		May 16	May 22	Anna & Dr. Mickans Psychological rec'd.		
					July 24 Annual Physical Dr. Salome	
Sept 8						
Sept 12		Sept. 16		Sibling visit		
Oct 2	Oct. 11		Nov. 5	S's at foster parents social		
		Nov 8[Wong record]				
Nov. 16						
Nov. 20	Nov. 27		Nov. 28	Re: tutoring		
Dec. 1		Dec. 8	Dec. 13	conference re visit		
Dec. 11	Dec. 27					

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SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
Jan 12						
		Jan 20				
Feb. 2						
Feb. 23						
	Feb. 28					
March 12			March 1	W853 to DSS	March 22-Anna has physical & eye exam	
March 22						
			March 23	conference		
March 26						
March 30						
April 2			April 2	tel. school		
			April 5	Social worker at school		
	April 5					
			April 6	Social worker tel Anna's teacher		
			May 2	Social worker reviews Anna's scores		
May 4		[redacted]				
May 14						
May 18			May 21	re: tutoring		
	May 22					
			Oct. 1	W853 to DSS		
					Oct. 16 Dental check-up	
			Oct. 19	Conference		
					Oct. 22 Annual Physical Dr. Salome	
Oct. 24	Oct. 30					
Nov. 13						
Nov. 19			Nov. 20			
		Dec. 8[Wong record]				
			Dec. 12	conference		
Dec. 17						

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SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS to FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
Jan. 4						
	Jan. 14					
			Jan. 16	social worker at Anna'a school to speak with counselor		
Feb. 1						
	Feb. 8					
Feb. 14						
Feb. 21			Feb. 27	S/w at school		
	March 1		March 1	W853 to DSS		
			March __,	Undated report to Court		
			March 20	Social worker at Anna'a school		
			March 25	Social worker and S's in Court		
	April 3					
			April 17	Social worker and S's in Court		
	May 22					
			May 29	Social Worker to School		
	June 12					
July 22						
	July 31					
Aug. 14						
Aug. 19						
	Aug 28					
Oct. 2						
Oct. 8						

CIAL WORKER LEPHONE CONTACT WITH OSTER HOME	SOCIAL WORKER VISITS to FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
	Oct. 15		Nov. 4	S's at adoptive Parents meeting		
—					Nov. 5 Annual Phycial Dr. Salome	
Nov. 7	Nov. 12					

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SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS to FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
			Jan. 6 (2x)			
			Jan. 7			
Jan. 7			Jan. 8	Maroney reads record		
		Jan. 9		Dr. Lewis sees Anna		
			Jan. 9	conference		
		Jan. 10				
Jan. 10			Jan. 10	social worker calls Bureau of Child Guidance		
			Jan. 10	Social worker sets date for clinic eval.		
			Jan. 24	Anna tested by Dr. Lewis		
Feb. 4						
Feb. 10						
Feb. 14						
			Feb. 17	memo for clinic apptment.		
		Feb. 18	Feb. 18	Social worker goes to Bur. of Child Guidance		
			Feb. 19	tel call with School		
			Feb. 20	memo for conference		
			Feb. 21	social worker speaks to Ms. Gilson of Bur. of Child Guid.		
			Feb. 24	Social worker sends letter to St.Vincents for Hearing test		
			Feb. 25	Social worker tel. with St.Vincent		
eb. 25						
			Feb. 27	Conference		
eb. 28(4x)						

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SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
arch 3			March 3	tel. St.Vincent		
arch 7						
arch 11			March 13	memo to Dr. deAlverado		
arch 19	March 19	March 19	March 19	Psychiatric Exam Conference		
arch 20 (2x)			March 20 March 21 March 24	memo memos		
pril 9			April 10	Conference		
pril 11			April 10 April 11	Memo memo		
			April 14	social worker speaks to truant officer		
			April 15	Social worker speaks to school		
			April 16	Social worker speaks to school		
pril 16 pril 17			April 17	memo		
			April 23	Social worker speaks to St. Vincent		
			April 23	Social worker speaks to Bur. of Child Guidance		
			April 24	Social worker goes to Bur.Child Guidance		
			Apirl 25	memo		
			April 28	memo		

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SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY
			April 30	Social worker speaks to St.Vincent's	
May 7					
May 9					
	May 12		May 12	memo	
			May 14	Social worker speaks to Bur.Child Guidance	
			May 14	Social worker goes to [redacted] BUR. CHILD GUID.	
May 14					
			May 15	Social worker speaks to Bur. Child Guid ane	
					May 17 Anna examined by Dr. John Davis, MD of Bur. Child Guidance
			May 21	Social Worker speaks to Bur.Child Guidance	
			June 3	" " "	
June 5					
	June 12		June 16	W853 to DSS	
			June 16	memo	
					June 21 Anna has eye examined
	July 21				[Anna summer school Staten Island Academy]
	Aug. 11				
	Aug. 27				
	Sept. 15				Anna at St. Roch's School
					Sept. 23 ANnual Physical

SOCIAL WORKER TELEPHONE CONTACT WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
	Oct. 22					
	Oct. 30					
	Nov. 19					
	Dec. 10					

SOCIAL WORKER TELEPHONE CONTACT — WITH FOSTER HOME	SOCIAL WORKER VISITS TO FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
	Jan 27					
	Feb. 18		March 31	Letter from S's atty		
	April 13					
	May 11				May 4 Anna Eye exam	
	July 15		July 30	memo	Aug. 2 Eye exam	
			Aug. 10	memo		
	Aug. 23					
	Sept. 14				Lynn Wong and Mr.S. seen by Dr. Mickjann M.D.	
			Nov. 26	letter from Mrs. S.		
					Dec. 27 Annual Physical Dr. Salome	

CIAL WORKER LEPHONE CONTACT WITH OSTER HOME	SOCIAL WORKER VISITS to FOSTER HOME	PLAINTIFF SEEN AT AGENCY OFFICE	SOCIAL WORK ACTIVITY	NATURE OF ACTIVITY	OTHER ACTIVITY	
					Jan, 16 Seen by Dr. for sore throat fever.	Nethan
			Feb. 10	memo		
			March 18	memo		
	[redacted]	MARCH 22	March 22	Conference	Dr. Piana sees all girls and M/m S	
	April 1					
	May 2		May 3	W853 to DSS		
	May 6		May 23	W853 to Court		
			July 11	memo re summer school		
	Aug 11					
			Aug. 22			
			Aug. 23			
			Aug. 24			